BRIEF IN SUPPORT OF APPLICATION FOR WRIT.

Opinion in the Court Below.

There was no opinion in the District Court, and the opinion in the Circuit Court of Appeals has not yet been reported, but appears at page 351.

Jurisdiction.

The jurisdiction of this Court is invoked under §240 (a) of the Judicial Code (28 U. S. C. A., §347 [a]). The order for mandate herein was entered on the 23rd day of August, 1944 (p. 370).

Statement of the Case.

This has been set forth in the foregoing petition.

Specification of Errors.

1. The Court erred in admitting in evidence the diary Defendant's Exhibit A.

2. The Court erred in refusing to direct a verdict in favor of petitioner.

Summary of Argument.

I.

Defendant's Exhibit A is a self-serving document, not properly admissible as a business record under 28 U. S. C. A. §695* and its admission was highly prejudicial to the petitioner.

*See Appendix.

II.

The undisputed evidence, in accordance with the adjudications of New York appellate courts, establishes plaintiff's employment as a matter of law, and a verdict should have been directed for the petitioner.

POINT I.

Defendant's Exhibit A is a self-serving document, not properly admissible as a business record under 28 U. S. C. A. §695, and its admission was highly prejudicial to the petitioner.

This exhibit (pp. 318-345) consisting of a diary in narrative style, composed partly by Mr. Lambrecht and partly by Mr. Allen (fol. 440), was destitute of every characteristic of a record kept in the "regular course of business", as such phrase was defined by this Court in *Palmer* v. *Hoffman*, 318 U. S. 109, and by the Second Circuit in the same case (129 Fed. 2d 976, 983).

The admissibility of business records depends, according to Mr. Justice Douglas (318 U. S. 114), upon

> "the probability of trustworthiness of records because they were written reflections of the day by day operations of a business"

and upon

> "the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation."

In refusing to interpret the Act so as to apply it to a "regular course" of conduct which may have some relationship to business, this Court further said:

"We cannot so completely empty the words of the Act of their historic meanings."

Yet the diary here before us cannot properly be described as a written reflection of the day by day operations of the business, and in any event is so highly motivated that there is lacking every "probability of trustworthiness" and every "earmark of reliability", for it was polluted at the source by Lambrecht's bias and his knowledge when he made the entries of March 5th and 6th that litigation might be imminent. This knowledge would naturally overpower whatever motive for accuracy he might otherwise have had—a determining consideration (see Judge Frank's opinion in the *Palmer* case, 129 F. 2d 976; 5 Wigmore Evid. §1522). The diary was admittedly inaccurate (pp. 158, 159, 168) and incomplete (pp. 157, 209, 232-3), and it was admittedly prepared only as the discretion and carefulness of Lambrecht and Allen would dictate (p. 233, fol. 698) Lambrecht admitted that he would have written his February 18th report differently if he had known then that they were going to have a lawsuit (p. 159, fol. 475). It was in no sense a mere objective, mechanical "reflection" of the day by day transactions of a business. It had every earmark of unreliability and untruthworthiness. It was not a record made "in the regular course of business".

Lambrecht's bias was strong, for respondent was obviously anxious to sell the stock to Sanders, its depositor (p. 193) and its friend of a good many years' standing (pp. 245-6). The Red Star Company was also a depositor, with respondent and its deposits had increased after the sale, while Sanders continued as President from an average of $10,000 to an average of $165,000 (p. 237, fol. 709). Naturally, respondent would want to justify a sale to Sanders without liability to petitioner. Therefore, when Lambrecht made his entries of March 5th and March 6th,

can it possibily be said that he was a mere distinterested amanuensis, overpoweringly inclined to accuracy; or was he not powerfully motivated to make as good a record as possible, both for the Bank and for himself? The prospect of imminent litigation was present in his mind sufficiently to cause him and Allen to consult counsel as to whether or not such litigation could succeed. His hope and belief that it would not succeed, necessarily colored and affected the entries he subsequently made.

The Circuit Court of Appeals, in its opinion, cites no authority, and indeed none can be found, to sustain the admissibility of such a diary. It merely compared this case with cases involving the admissibility of hospital records (p. 356). But when the *Palmer* case was before that Court, Judge Frank distinguished hospital records from the record there involved by saying, at 129 Fed. 2d 992, that the former are "ordinarily not made by persons with impelling motives to misrepresent." In fact, in no case cited by the Court below was the hospital whose record was used itself a party to the litigation.

The Court below also overlooked the inferential condemnation by this Court in the *Palmer* case, at 318 U. S. 113, of the use of diaries, for Mr. Justice Douglas, in his opinion, in speaking of the possible use of a lawyer's diary in the event that the bars were let down, said:

> "We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify its reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such."

Those words fit this case exactly.

The Supreme Court of New York has refused to permit the use as evidence of a lawyer's regularly kept diary (*Hughes* v. *Eastern Contracting Co.*, 164 Misc. 318, Approved, 264 App. Div. 573).

The entries of March 5th and 6th were not even the type of entries which, according to respondent's own rules, "must be" made by the man in charge of the estate, for he was only *obliged* to enter such things as the rendering of an account, the decree of a court, the consent to the sale of securities by beneficiaries, etc. (pp. 232-3). The entries of March 5th and 6th, therefore, cannot possibly be said to have been made as a part of a method "systematically employed for the conduct of a business as a business", any more than the keeping of a record of accidents was a record of the railroad business as such in the *Palmer* case.

However, assuming that the record is admissible as a business record, that does not open the door to the use of that record as a means of presenting testimony which would be inadmissible if testified to by a living witness (*Lykes Brothers Steamship Co.* v. *Grubaugh* [5 Cir. 1942] 128 Fed. 2d 387, 390; *Freedman* v. *Mutual Life Insurance Co.*, 342 Pa. 404, 414; *People* v. *Kohlmeyer*, 284 N. Y. 366; *Roberto* v. *Nielson*, 288 N. Y. 581; *Constantinides* v. *Manhattan Transit Co.*, 264 App. Div. 147).

In the *Lykes Brothers* case, the Court said, per Hutcheson, *C. J.*:

> "The conclusion in the hospital report that plaintiff was fit for work was properly excluded. The Statute making such reports evidence merely accredits the facts that they contain, it does not purport to make opinions admissible as evidence."

Thus, Lambrecht could not have testified to a conference with the Bank's attorneys, or as to his conclu-

sions; as to what he told them or what they said to him,—all in the absence of petitioner. Not even the attorneys themselves could have testified to the giving of an opinion to their client concerning the petitioner's right to recover compensation for his services. Yet in spite of specific objections (fols. 441-2, 446-7), this record, containing such objectionable evidence, was allowed to be read to the jury.

Advice of counsel is never a defense in a civil action, except where want of probable cause is an essential part of the cause of action; and even then, it must first be proved that the advice was given after a full and fair statement of the facts (38 C. J. 427, *et seq.;* 18 R. C. L. 45, *et seq.; Lathrop* v. *Mathers*, 143 App. Div. 376, 380).

The prejudice caused by the entries is self-evident. In both entries, there are statements which, if believed by the jury, would show that the petitioner was never employed, and that he so understood. The March 5th entry also reinforces respondent's claim with the opinion supposedly given by its counsel. By these entries, prepared with this background, respondent was permitted to make itself both judge and jury in its own cause, and to destroy plaintiff's right through the instrumentality of its own privately prepared memorandum.

As to respondent's claim that the door was opened to the introduction of this diary by reason of plaintiff's introduction of Exhibit 12, it should be sufficient to say that the learned Circuit Court of Appeals did not pass upon that contention, because it considered it unnecessary in view of its determination that Exhibit A was admissible as a business record. However, the contention that the door was opened is wholly without merit. Exhibit 12 is dated February 18th, long before the entries in question, and it was a separate, integral paper (p. 294). So far as the plaintiff knew, when he offered it in evidence, it was

not even related to Defendant's Exhibit A. It was not a physical part of it, although it so happened that a copy of it was made and inserted in Exhibit A; but even that copy varies in that it contains marginal notes missing from the original (pp. 294, 326-7).

When Defendant's Exhibit A was offered in evidence, it was not offered for the purpose of explaining or qualifying Exhibit 12, but solely as a paper admissible under the Business Records Act (p. 146, fols. 437-8). There is not a single respect in which Exhibit A can be said to explain or qualify the language of Exhibit 12, and it would be strange, indeed, if entries made March 5th and 6th could serve such a function with respect to a record made more than two weeks earlier. It would open the door to the avoidance of any damaging admission by a retraction made subsequently.

Exhibit 12 purported to be merely an analysis of an offer made by Newtown Creek which had been rejected by respondent long before March 3rd (pp. 285-7), and in no sense could the later entries, relating to entirely different offers, be explanatory of the earlier. For instance, the advice of counsel, received on March 5th, could hardly be deemed explanatory of language used by Lambrecht on February 18th.

It is true that a party may avail himself of other statements made by him "at the same time", tending to destroy or modify the use which might otherwise be made of his admissions (*Rouse* v. *Whited*, 25 N. Y. 170, 175), but even where part of an utterance has been put in evidence, and the remainder of that same utterance is offered, "No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable"; "No utterance irrelevant to the issue is receivable"; and "The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony" (*People* v. *Schlessel*, 196 N. Y. 576, 481; 7 Wigmore, *Evidence*, §2113).

The entries of March 5th and 6th would certainly fail to qualify on any of the three grounds thus enumerated.

The decision sought to be reviewed exalts corporate trustees into a class apart, and gives them the right—surely not possessed by their beneficiaries or the attorneys of the beneficiaries, or by any other class of person—to record in diary form their interpretations and versions of transactions, even though claims against them based thereon may be imminent. It permits them, in such form, to record transactions occurring in the absence of the beneficiaries, and not subject even to contradiction. It permits them to enter opinions rendered, or allegedly rendered, justifying their conduct as trustees; and all of this they are entitled later to present to a court of law as evidence, and what is more, as evidence not subject to cross-examination. If that is to be the law, it marks a radical and historic break with the past, for to deprive a party of his right to cross-examination is to deprive him of what has been recognized as the greatest single safeguard of the truth, and perhaps the greatest single contribution that the English common law has made to the administration of justice (5 Wigmore, *Evidence*, §1367).

It is not surprising that this decision is wholly without precedent in the entire field of the law, so far as the writer can discover. If it is to be approved by this court, it should only be done after solemn consideration and a full hearing on the merits.

POINT II.

The undisputed evidence, in accordance with the adjudications of the New York appellate courts, establishes plaintiff's employment as a matter of law, and a verdict should have been directed for the petitioner.

On this point the opinion says (pp. 352-3):

> "There was plainly an issue of fact whether the plaintiff was employed by the Bank to sell stock (which it owned as trustee for two estates) or whether it merely told him in effect that it would consider any offer he might submit."

The Court of Appeals of the State of New York has held, that a mere request to a broker to "submit offers" is proof of employment, in affirming without opinion, on July 20th, 1944 (293 N. Y. .....) *Shapiro* v. *Greenwich Savings Bank,* 266 App. Div. 359. That decision is in accord with well-established principles of law, to the effect that where a broker acts with the consent of the principal, or where the principal accepts the labor of the broker, that constitutes employment (9 C. J. 516; *Sibbald* v. *Bethlehem Iron Co.,* 83 N. Y. 378, 379). Since respondent's vice-president, Allen, admitted that he expressly authorized the petitioner to attempt to find a purchaser (pp. 199-200), employment was established as a matter of law. Yet the courts below have construed these admitted facts as the opposite of employment.

If this petition is granted by this Court, it will be shown, as it was below, that performance was also conclusively established. Evidently the Circuit Court was satisfied on this score, since the issue of employment was the only one mentioned by it as presenting a jury question (p. 353).

Petitioner's employment was in no way affected or impaired by the circumstance that he was to receive his compensation from the purchaser, for it is recognized that under those circumstances there is double employment (*Grossman* v. *Herman*, 266 N. Y. 249, 252; *Atkinson* v. *Pack*, 114 N. C. 497, 604); and the seller is liable in damages for the amount of commissions that the broker was prevented from earning by the failure of the seller to complete the sale (8 *Am. Jur.* 1072; *Aronson* v. *Carobine*, 129 Misc. 800; *Pease & Elliman Co.* v. *Gladwin Realty Co.*, 216 App. Div. 421; *T. C. Henry & Sons Co.* v. *Colorado Farm Co.*, 8 Cir., 164 Fed. 986, 988; *Charles K. Byrd & Co.* v. *The Age-Herald Publishing Co.*, 219 Ala. 505).

CONCLUSION.

It is respectfully submitted that the petition for a writ should be granted.

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